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No. 98-635

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

FRANCES MCPHAIL, as administratrix of the estate of David Harry McPhail, deceased,

Petitioner,

v.

MITSUBISHI MOTOR SALES OF AMERICA, INC.; MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC.; VALUE RENT-A-CAR, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondents disagree with Petitioner's Questions Presented for Review. The sole question presented for review is whether this Court should exercise its discretion to grant the Petition, when the Petitioner has not shown that the Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

PARTIES TO THE PROCEEDINGS

The Petition does not accurately list the parties to the proceedings. The proper parties are:

1. Frances McPhail, as Administratrix of the estate of David Harry McPhail, deceased.
2. Mitsubishi Motor Manufacturing of America, Inc.
3. Mitsubishi Motor Sales of America, Inc.
4. Value Rent-A-Car, Inc.
5. Mitsubishi Motors Corporation, parent corporation of respondents Mitsubishi Motor Manufacturing of America, Inc. and Mitsubishi Motor Sales of America, Inc.
6. Republic Industries, Inc., parent corporation of respondent Value Rent-A-Car, Inc.[1]
7. Alamo Rent-A-Car, Inc. (see footnote 1, below).

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[1] Republic Industries, Inc. ("Republic"), the parent corporation of Alamo Rent-A-Car, Inc. ("Alamo"), purchased Value Rent-A-Car, Inc. ("Value") in mid-1997. Effective November 1, 1997, Alamo and Value were merged and operate as Alamo Rent-A-Car, Inc.

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STATEMENT OF THE CASE

Respondents disagree with Petitioner's Statement of the Case to the extent that it is both factually inaccurate and argumentative.

A. Course of Proceedings and Dispositions in the Courts Below.

On January 8, 1996, Petitioner filed her complaint in the Circuit Court of Mobile County, Alabama against Value Rent-A-Car, Inc. ("VRAC"), Mitsubishi Motor Manufacturing of America, Inc. ("MMMA"), Mitsubishi Motor Sales of America, Inc. ("MMSA"), and Richard's Garage of Mobile ("Richard's Garage"). Petitioner's complaint alleged the existence of numerous defects in a 1994 Mitsubishi Galant, which allegedly resulted in the death of Petitioner's decedent, David Harry McPhail.

On February 8, 1996, MMMA, MMSA, and VRAC (collectively "the Respondents") properly removed the action to the United States District Court for the Southern District of Alabama based on the fraudulent joinder of Richard's Garage. Richard's Garage was merely storing the vehicle following the accident. On March 22, 1996, the District Court denied Petitioner's Motion to Remand and dismissed Richard's Garage.

On February 20, 1997, Respondents moved for summary judgment based on Petitioner's failure to offer evidence to support a *prima facie* case for any of her defect theories. Petitioner filed her response to Respondents' summary judgment motion on March 11, 1997. Exhibit 1 to Petitioner's response was a report prepared by J.

Albert McEachern, Jr., P.E., who had not been offered for deposition, and whose report was not in affidavit form. (Petitioner's Appendix to Petition for A Writ of Certiorari ("Appendix") p. 35.) On March 25, 1997, Respondents filed a motion to strike McEachern's report.

On June 4, 1997, the District Court struck McEachern's report (Appendix p. 7), and granted Respondents' motion for summary judgment. (Appendix p. 19.) On June 12, 1997, Petitioner filed her notice of appeal to the United States Court of Appeals for the Eleventh Circuit. On April 10, 1998, the Court of Appeals issued a written opinion affirming the decisions of the District Court. (Appendix p. 3.) On April 23, 1998, Petitioner sought rehearing *en banc* by the Court of Appeals. On July 16, 1998, the Court of Appeals denied the Petitioner's Application for Rehearing. (Appendix pp. 1-2.)

B. Statement of the Facts.

This product liability action arises out of a single-vehicle accident that occurred on March 19, 1994.[2] Petitioner's decedent, David Harry McPhail, was the driver and sole occupant of a 1994 Mitsubishi Galant, which he had rented from VRAC in Jacksonville, Florida. The 1994 Galant was designed by non-party Mitsubishi Motors Corporation ("MMC"), manufactured by MMMA, and distributed by MMSA.

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[2] The facts of this accident are set forth in the District Court's June 4, 1997 Order granting Respondents' summary judgment motion, starting at page 21 of the Appendix.

The accident occurred at 12:25 a.m. while the Galant was traveling at a high rate of speed north on Alabama State Road 188 in Mobile County, Alabama. The vehicle left the roadway at a sharp left-hand curve, rolled over, and collided with a pecan tree. The impact was to the driver's side of the 1994 Galant. Petitioner's accident reconstruction expert, James Anderson, testified at deposition that, at the time the vehicle left the road, it was traveling approximately 70 mph. The posted speed limit for the curve was 45 mph. Anderson testified that the vehicle slid sideways, tripped, rolled over two and one-half times, and impacted the tree in an upside-down fashion with the driver's side leading. Anderson opined that the vehicle struck the tree at approximately 47 mph. It was undisputedly an extremely severe and violent accident. McPhail died as a result of injuries sustained in the side impact with the tree. An autopsy later revealed that McPhail had a core blood alcohol level of 0.108%.

In her complaint, Petitioner claimed "defects" in the following components of the subject vehicle: (1) the suspension system (specifically the "knuckle");[3] (2) the driver's air bag; (3) the vehicle's passenger compartment;

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[3] The knuckle connects the rear wheel/tire assembly to the vehicle's steering and suspension systems.

(4) the headlights; (5) the steering; and (6) the brakes.[4] (Appendix p. 25.)

Pursuant to the District Court's initial scheduling order, Petitioner was to provide expert reports as required by Fed. R. Civ. P. 26(a)(2) by December 1, 1996, and to offer her experts for deposition by December 31, 1996.[5] The District Court later granted Petitioner an extension until January 2, 1997 to file her expert reports and until February 1, 1997 to offer her experts for deposition. On December 23, 1996, Petitioner's counsel notified opposing counsel that, although a curriculum vita for J. Albert McEachern, Jr., P.E. had previously been provided, Petitioner did not intend to offer McEachern as a witness at trial and did not have a Rule 26 report from McEachern.

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[4] As noted in the District Court's June 2, 1997 Order granting summary judgment in favor of Defendants, Counts Seven through Ten of the Complaint did not state specific causes of action. (Appendix p. 20.) Count Eleven of the Complaint sought an injunction regarding storage and testing of the subject vehicle. The District Court granted summary judgment on Count Eleven because "the parties themselves have resolved the concerns raised in Count Eleven and because plaintiff has not pursued her request for injunctive relief." (Appendix p. 33.)

[5] The facts relating to the District Court's scheduling order and the timing of expert disclosures are set forth in the District Court's June 2, 1997 Order striking McEachern's report as an exhibit to Petitioner's Opposition to Motion for Summary Judgment. (Appendix p. 7.)

Following the depositions of Petitioner's four remaining liability experts, Respondents moved for summary judgment based on Petitioner's failure to offer evidence to support a *prima facie* case for any of the claimed defect theories. Specifically:

1. Petitioner's experts conceded that the fracture to the knuckle of the subject vehicle was a single-event, sheer overload fracture that would have required the application of a side load of 30,000-40,000 pounds of force. However, Petitioner's experts had no possible explanation about what could have caused the fracture prior to the vehicle leaving the road. Further, Petitioner's experts conceded that there was no fatigue or precracking of the knuckle. Finally, Petitioner's experts admitted having no specific safer and practical alternative design for the knuckle.

2. It was undisputed that the driver's air bag did not deploy; but experts for both sides unanimously agreed that its deployment would not have prevented McPhail's death in this side impact collision.

3. With respect to the claimed "passenger compartment" defect, Petitioner presented no evidence that anything about the passenger compartment caused or contributed to the injuries sustained by McPhail.

4. As to the headlight, steering and brake claims, Petitioner's experts conceded that they had no substantiating evidence.

Pursuant to Rule 8 of the Local Rules for the U.S. District Court for the Southern District of Alabama,

Respondents' motion for summary judgment was accompanied by suggested "Determinations of Undisputed Fact and Conclusions of Law." Petitioner's response, in violation of Local Rule 8 and the order of the District Court, failed to indicate that Petitioner disputed any of the facts set forth in Respondents' suggested "Determinations of Undisputed Fact." Rather, Petitioner attempted to avoid summary judgment by trying to fill the holes in her case with a "rebuttal" expert report from McEachern. However, McEachern's report was not at all in the nature of rebuttal expert testimony, but instead was an untimely, last-ditch effort to attempt to make out a *prima facie* case. Respondents moved to strike McEachern's untimely report, which was not in the form of an affidavit, and which was not otherwise verified.

After reviewing the motions, briefs and exhibits filed by the parties, the District Court struck McEachern's report (Appendix p. 7.), and granted Respondents' motion for summary judgment.[6] (Appendix p. 19.) Petitioner appealed both rulings to the United States Court of Appeals for the Eleventh Circuit. Following affirmance, Petitioner unsuccessfully sought rehearing *en banc*. (Appendix pp. 1-6.) Petitioner now seeks review by Writ of Certiorari.

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[6] The District Court also denied a motion for summary judgment filed by Petitioner.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. PETITIONER HAS NOT SHOWN THAT THERE IS ANY COMPELLING REASON FOR GRANTING THE PETITION.

Throughout the history of this action, Petitioner has consistently attempted to confuse the issue with a literal "grab bag" of claims and irrelevant arguments. Unfortunately, that pattern has not changed with the Petition filed before this Court.

This product liability case, which is governed by Alabama law, does not present any novel or complex issue of law. Indeed, this case does not even present a federal question. Petitioner's complaint in the instant action was dismissed because Petitioner had failed to meet her burden under Alabama law. Summary judgment was properly entered and affirmed. Moreover, despite Petitioner's rambling arguments, there are simply no important issues for this Court to resolve. The primary "issues" Petitioner raises before this Court can be addressed in short order.

Petitioner first appears to argue that both the District Court and the Eleventh Circuit erred in requiring Petitioner to comply with the requirements of the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), the Alabama common law doctrine that is clearly applicable to Petitioner's claims. (Appendix p. 19.) Contrary to Petitioner's assertions, this case has nothing to do with the National Highway Traffic and Motor Vehicle Safety Act or federal preemption, and certainly does not warrant

review by this Court. Both lower courts analyzed Petitioner's extremely meager evidence, and concluded that Petitioner failed to show a safer, practical alternative design,[7] or to present evidence that the alleged defects were the cause of McPhail's accident or fatal injuries. Accordingly, Petitioner's complaint was dismissed because Petitioner failed to "make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Petitioner simply failed to carry her burden under Alabama law.

The Petition appears to argue that Petitioner could have met this burden through out-of-court statements purportedly made about the subject vehicle, and incorrectly implies that the District Court excluded these statements. There was never any such evidentiary ruling and,

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[7] In fact, the requirement that a plaintiff show a feasible, practical and safer alternative design as a prelude to asserting a product defect is widely accepted in automotive product liability cases. *Huddell v. Levin*, 537 F.2d 726 (3rd Cir. 1976); *Ayres v. Sears Roebuck & Co.*, 789 F.2d 1173 (5th Cir. 1986) (applying Texas law); *Taylor v. General Motors Corporation*, 875 F.2d 816 (11th Cir. 1989) (applying Florida law); *Pacheco v. Coats Co., Inc.*, 26 F.3d 418 (3rd Cir. 1994) (applying Pennsylvania law); *Allen v. Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) (applying Utah law); *O'Bryan v. Volkswagen of America, Inc.*, 39 F.3d 1182 (6th Cir. 1994) (applying Kentucky law); *Caiazzo v. Volkswagenwerk, A.G.*, 647 F.2d 241 (2nd Cir. 1981) (applying New York law); *Elliot v. Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), *cert. denied*, 498 U.S. 1048 (1991) (applying Alabama law); *Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833 (3rd Cir. 1981) (applying New Jersey law); *Larson v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (applying Minnesota law).

in any event, none of the referenced statements are relevant to the requirement of Alabama product liability law that Petitioner present evidence of a safer, practical alternative design.

Petitioner also complains that the lower courts erred in failing to consider McEachern's unverified report. The District Court struck McEachern's report, which was attached as Exhibit 1 to Petitioner's Opposition to Motion for Summary Judgment. Petitioner's tortured argument that McEachern's report was a "rebuttal report" under Fed. R. Civ. P. 26 completely misses the point. As both the District Court and the Eleventh Circuit recognized, the McEachern report was submitted in opposition to Respondents' summary judgment motion. Indeed, Petitioner has been consistent in arguing McEachern's report should have been considered in response to the summary judgment motion. However, McEachern's report was not in the form of a sworn affidavit, deposition or other appropriate form of evidence, and was thus not properly submitted under Fed. R. Civ. P. 56(e). Moreover, McEachern's report was not timely submitted and, as the Eleventh Circuit found, the District Court was well within its discretion in refusing to consider McEachern's report. (Appendix p. 4.)

Petitioner's failure to timely provide McEachern's expert report, or to properly offer verified evidence in opposition to Respondents' summary judgment motion, are clearly not important questions of federal law. The lower courts' rulings in this case are not contrary to any decisions of this Court. Petitioner's failure to comport

with the clear and unambiguous requirements of the Federal Rules of Civil Procedure is simply not an issue that warrants review by this Court.

Petitioner also improperly suggests that Respondents somehow suppressed evidence by purportedly not providing certain photographs in a usable form. What Petitioner fails to acknowledge is that she in fact had opted for laser copies of the referenced photographs, rather than clearer photographic reproductions. Petitioner made this "red herring" argument below, and both the District Court and the Court of Appeals properly disregarded it. Again, this issue does not present any important federal question that would warrant consideration by this Court.

Finally, Petitioner suggests that her product liability case should have been allowed to proceed under either a warranty or common law negligence theory. As reflected in the District Court's Order granting summary judgment, neither argument has merit. The Alabama Supreme Court in *Geohagan v. General Motors Corp.*, 279 So. 2d 436 (Ala. 1973), specifically rejected warranty claims as a basis for wrongful death actions, such as the instant case. (Appendix p. 32.) Further, common law negligence claims have been subsumed by the AEMLD. *Veal v. Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991). (Appendix p. 25.)

In sum, none of Petitioner's claimed "critical errors" rise to the level of an important question of federal law warranting grant of certiorari. For these reasons, this Court should deny the Petition.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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